Petition

Office - Supreme Court, U.S.
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No. 81-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EUNICE C. MADISON,

Petitioner,

v.

MARION S. BARRY, Jr., MAYOR,
THE DISTRICT OF COLUMBIA, *et al,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether state action in terminating a non-probationary tenured psychologist, also possessed of Civil Service competitive status for lifetime availability, without procedural safeguards, depriving petitioner of her property interest in such tenure contravenes the rights granted under the Fifth and Fourteenth Amendments, when the termination was effected under a law which has no provision for mandatory retirement, but which instead buttresses her property interest in such tenure mandating protection of it.

2. Whether the granting of summary judgment upon the basis of incomplete consideration by the trier of fact of the administrative record, containing such procedural defects is not an abuse of discretion violative of the Administrative Procedure Act and Federal Rules of Civil Procedure, and should be overturned.

3. Whether an agency, a political subdivision of a state and a municipality which has implemented the entire protections of the Age Discrimination in Employment Act of 1967 as amended, (ADEA), abolishing mandatory retirement except for those employees specifically excluded by such Act, acts *ultra vires* in maintaining mandatory retirement for psychologists, without proof of bona fide occupational qualification, or overriding legitimate state interest therefor.

4. Whether an agency having a dual personnel system, some of whom, by that agency's own regulations are retired under the Civil Service Retirement Act, under which Act, ADEA has abolished mandatory retirement, promotes unequal protection of the laws in contravention of the Fourteenth Amendment, when it subjects the other group of employees such as psychologists to man-

datory retirement based on arbitrary stereotypes of ageism without proof of bona fide occupational qualification or overriding legitimate state interest therefor.

5. Whether discretion to waive or not to waive a mandatory retirement requirement does not constitute an administrative act by the authorized official, which if not timely taken, constitutes an automatic waiver of such mandatory retirement.

6. Whether subjecting a psychologist to mandatory retirement on such arbitrary basis is in contravention of the proscription against age discrimination by agencies considerably assisted by Federal funds, in contravention of the Age Discrimination Act of 1975, and should be overturned.

7. Whether the humane remedial purpose of the ADEA has not been contravened by the arbitrary capricious action of the District of Columbia Public Schools (DCPS) in mandatorily retiring petitioner, and should therefore be overturned.

8. Whether when discretion is provided for an agency to waive a mandatory retirement age, such discretion should be based on as strict requirements as must be applied under the ADEA for early retirement, i.e. bona fide occupational qualification and overriding legitimate state interest therefor, or if discretion is allowed, the agency must obey the ADEA and not effect the retirement.

9. Whether the restrictive act of the District of Columbia D.C. Code 31-723(c), also a Congress Act, Public Law 90-231, Sec.(2)(c), requiring mandatory retirement is preempted by the more liberal act of Congress, the ADEA, because Congress has control over any act of the District of Columbia whatsoever, under Article I, Section

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Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Eunice C. Madison, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 1, 1981, with rehearing *en banc* denied on August 31, 1981.

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[1]The other respondents are Superintendent of Schools, Vincent E. Reed, and President of the School Board, R. Calvin Lockridge, no longer in those offices.

JUDGMENT BELOW

Judgment of the Court of Appeals for the District of Columbia Circuit along with the Order overruling Petitioner's Petition for Rehearing *en banc*, and the unpublished Memorandum Opinion of the United States District Court are attached as Appendices hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1981. A timely petition for rehearing with a suggestion that the rehearing be *en banc* was denied on August 31, 1981. Petition for extension of time to January 28, 1982, in which to file petition for writ of certiorari was granted by Chief Justice Burger November 24, 1981. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution Article I

Section 8, Cl. 17 and 18

The Congress shall have the power

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States . . .

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Con-

stitution in the government of the United States, or in any department or officer thereof.

Amendment V

No person shall be deprived of life, liberty, or property, without due process of law . . .

Amendment XIV, Section 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Public Laws

Public Law 93-407, September 3, 1974

Sec. 204(a)

Each person receiving basic compensation under class 15 of the salary schedule in section 1(a) of the District of Columbia Teachers' Salary Act of 1955 (D.C. Code, Sec. 31-1501) shall be issued a five-year teaching certificate. Renewals shall be dependent upon application and six or more hours of appropriate credit earned during the

preceding five-year period. The District of Columbia Board of Education shall establish appropriate rules, regulations, and requirements to carry out the purposes of this section.

Public Law 93-198, September 24, 1973

Sec. 601.

Notwithstanding any other provision of this Act, the Congress of the United States observes the right at any time, to exercise the constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Congress by this Act, including legislation for the District on any subject, whether within or without the scope of legislative power granted to the Congress by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

Sec. 204 (g)

Any employee in the competitive service of the United States transferred to the government of the District under the provisions of this section shall retain all the rights, benefits, and privileges pertaining thereto held prior to such transfer. When such an employee vacates the position into which he was transferred, such position shall no longer be a position in such competitive service.

Sec. 422 (11)

The Mayor is authorized to issue and enforce administrative orders, not inconsistent with this or any other Act of the Congress or any act of the Council, as are necessary to carry out his functions and duties.

Public Law 79-404, June 11, 1946, the Administrative Procedure Act

Public Law 94-142, November 29, 1975, Education of All Handicapped Children Act (EAHCA)

Public Law 90-231, December 29, 1967 Sec. (1)(c) and D.C. Code § 31-723(c)

Any teacher who becomes seventy years of age shall be separated from the service unless upon the written recommendation of the Superintendent of Schools two thirds of the members of the Board of Education vote to retain such teacher in the public schools for the good of the service.

Public Law 91-657, January 8, 1971, Practice of Psychology Act

Public Law 94-135, November 28, 1975
Age Discrimination Act of 1975 (ADA)

Public Law 95-454, October 13, 1978 Civil Service Reform Act
D.C. Law 2-139 § 3207 (d)

Notwithstanding any other provision of this act, wherever Federal Merit System Standards are applicable to a District program financed in whole

or in part by the federal funds, the Mayor shall establish rules and regulations to the extent necessary to apply such standards to personnel administration in such grant-in-aid programs and the positions and employees therein.

Public Law 96-122, November 17, 1979, District of Columbia Retirement Reform Act

School Board Regulations, Chapter IX

Section 9.1 All employees of the Board of Education governed by the Teachers' Retirement Act of 1946, as amended, shall be retired under the existing provisions of that law.

Section 10.1 All employees of the Board of Education governed by the Civil Service Retirement Act shall be retired under the provisions of existing law governing the retirement of such employees.

D.C. Code § 1-310 n (1973)

Salaries Fixed
Salaries of officers and employees of the government of the District of Columbia are fixed by the classification laws set forth in 5 U.S.C. See, particularly, 5 U.S.C. §§ 5101 *et seq.*

D.C. School Board Regulations, pursuant to Public Law 93-407, Sec. 204(a)

Sec. 1.0 General Policy 1.2

Teaching certificates shall remain valid for a period of five (5) years from the date of issuance, and must be renewed in accordance with this Chapter prior to their expiration. (Emphasis supplied).

U.S. Code 42 U.S.C. § 2000e-16 (CRA)

(a) All personnel actions affecting employees or applicants for employment . . . *in those units of the Government of the District of Columbia having positions in the competitive service* . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin. (Emphasis supplied).

29 U.S.C. § 633a (ADEA)

All personnel actions affecting employees or applicants for employment. . . *in those units of the Government of the District of Columbia having positions in the competitive service.* . . shall be made free from any discrimination based on age. (Emphasis supplied).

29 U.S.C. § 627 (ADEA)

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon the premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

29 U.S.C. 623(f)(1) and (2) (ADEA)

(f) It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit, plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . .

STATEMENT OF THE CASE

Petitioner, Eunice C. Madison, a tenured non-probationary employee, was competitively appointed to the position of school psychologist in September 1964 by the District of Columbia Public Schools (DCPS). The first year she was in temporary status, during which time her retirement deductions were credited to the Civil Service Retirement Fund. Thereafter, she served two years in probationary status, gaining permanent status in September 1967, thus completing the competitive appointment requirements in accordance with DCPS competitive appointment rules. She also possessed Civil Service Competitive status for lifetime availability, granted in April 1956 when she occupied a competitive Civil Service position. She is also a licensed psychologist in the District of Columbia under Public Law 91-657, which has no age limits.

No mandate issued in 1977 to mandatorily retire petitioner when she reached age 70, whether by discretionary waiver by the Superintendent, or policy allowing employees to complete fifteen years of creditable service, or in respect of the teacher's certificate (psychologists are classified as teachers) issued to petitioner in September 1975 in accordance with Public Law 93-407. Sec. 204(a) of that Act provides for the issuance of such certificates, and regulations of the DCPS School Board provide that such certificate "shall remain valid for five years".

A letter from Claudette Helms, Director of Personnel of DCPS, was received by petitioner on June 5, 1979, stating that she would be retired at the end of the school year, because she had reached the age of 70 in 1977. Petitioner's supervisor, Ms. Barbara Stockton, wrote a memorandum dated June 13, 1979, to Claudette L. Helms, (App. 29)[2] requesting that waiver be granted in the mandatory retirement of petitioner, stating:

> We are in the midst of processing a heavy case load especially geared to a change in the way of servicing pupils for the school year 1979-80. Her [petitioner's] experience and capabilities will be of much benefit for this reason.

Petitioner applied for and was accepted for summer work for two weeks in July 1979, earning a certificate of achievement for such service. Not until August 30, 1979, was another notice of mandatory retirement received. It was for effect the very next day, was sent by ordinary mail, misaddressed, and was received four days before the opening of the school year. Enclosed with it were retirement application forms to be completed consenting to the retirement. Petitioner did not return the forms. The letter (App. 30) of Claudette L. Helms stated:

> If we have not received these retirement forms in this office as of August 31, 1979, your papers will be completed by this office and you will be placed on mandatory retirement effective as of that date.

No published regulations according to the Administrative Procedure Act provided for one day's notice

[2](App. 29) refers to document in Joint Appendix filed in Court of Appeals. Subsequent numbers refer to other documents in that Joint Appendix.

and such summary effecting of retirement. No official personnel action forms were received until October 1979, nor were any retirement checks received until October 1979. They were not substantial, being approximately one-fourth of the previous salary. Two personnel action forms terminating employment were received, one separating petitioner from her regular place of employment in Region V in the Bruce Administration Building (App. 27); and the other (App. 41) separating her from her summer employment in the Office of Educational Program Services and Development-Title I in Dunbar Junior High School. Each of them stated:

> Having reached the age of seventy-two (72) years, and having fourteen (14) years, 2 months of service, Ms. Madison is being retired under the provisions of Public Law 93-407, 93rd Congress, as amended.

The aforesaid act contains no provisions for mandatory retirement, instead protects petitioner's tenure under its section 204(a), which tenure constitutes a property interest, of which petitioner was summarily deprived by the one day's notice received August 30, 1979 (App. 30), effective August 31, 1979. No retirement documentation was ever received, not even an annuity statement. Since nothing definite was received until October petitioner continued coming to her place of work. She received pay slips until the end of the year, without any pay however. It is not known who authorized the retirement. Respondents presented no forms current of that time, only an old authorization of beneficiary form dated September 17, 1965, (App. 40).

Immediate recruitment was begun for the position of petitioner as evidenced by advertisement of the vacancy in

"District of Columbia Public Schools Job Opportunities, the Official Vacancy Listing for the Public Schools of the District of Columbia, An Equal Opportunity Employer", dated September 1, 1979, (App. 36-39). The vacancy is shown on page 3 (App. 38) as item NN, Psychologist, TSA 15, Pupil Personnel Center, Old Bruce Administrative Unit, which was petitioner's place of employment. The position was left vacant and unfilled for almost five months when it was filled by a psychologist who was younger than forty years of age, and with less qualifications and experience than petitioner.

Meanwhile five schools serviced by petitioner were left without regular psychological services, to the detriment especially of handicapped children, whom it was one of the primary duties of petitioner to evaluate for placement and services in conformance with *Mills v. Board of Education of the District of Columbia,* 348 F. Supp. 866 (D.D.C. 1972), and Public Law 94-142, Education of all Handicapped Children's Act (EAHCA) (1975). A case was filed in November, 1979, in United States District Court for the District of Columbia by parents of such children protesting delay in appropriate educational placement for them. The case is still pending. It is a continuation of *Mills supra.*

Petitioner was at all times willing, able, and capable of filling the position. She earned outstanding ratings covering her services for academic years 1977-78, admitted by respondents,[3] and 1978-79 (App. 33). In fact she had worked with many handicapped children for whom some data had already been collected.

Nevertheless she was arbitrarily dismissed on the basis of age alone. There is no dispute that the termination was

[3]Respondent's answer to complaint (App. 7, paragraph 10).

on that basis alone. Respondents have offered no proof that age is a bona fide occupational qualification for the position of school psychologist, nor have they presented proof of an overriding legitimate state interest for such classification. In fact it was contrary to the good of the service to delay placement of handicapped children by leaving the critical position of school psychologist vacant.

Mayoral order DPM21-A12 dated July 6, 1978 (App. 24-26) implemented the full protections of the ADEA for all employees of the District of Columbia Government including:

1. Removes the mandatory separation requirement of Federal and D.C. Government employees who attain age 70 with 15 years of creditable government service;
2. Retains the minimum age limit of 40 for ADEA protection against discrimination on account of age;
3. Removes the upper age limit for ADEA protection; and
4. Repeals statutory prohibitions against permanent appointments for persons age 70 or more.

The mandatory separation was retained as in ADEA for law enforcement officers, firefighters, and air traffic controllers. Neither teachers nor psychologists are mentioned in that directive as still being subject to mandatory separation.

Petitioner filed suit in the United States District Court on April 28, 1980, against Respondents alleging age discrimination in employment in mandatorily retiring her on the arbitrary basis of age alone. The retirement had been made arbitrarily without proof of bona fide occupa-

tional qualification, or overriding legitimate state interest therefor, without extending to her the protection of the Mayoral Order of July 6, 1978, which implemented the ADEA for all D.C. Government employees. Though waiver of mandatory retirement had been requested by petitioner's supervisor on June 13, 1979, (App. 29) no reply was received till July 30, 1979, (App. 31). No Documentation was ever received confirming that the Superintendent of Schools had denied the waiver.

Petitioner had been mandatorily retired effective August 31, 1979, having received notice of it one day before by ordinary mail. The mandatory retirement was summarily effected, no confirming documents having ever been received by petitioner therefor from the D.C. Retirement Section.

A Memorandum Opinion (Appendix C pp. 5a-9a) was issued by the District Court August 26, 1980, granting summary judgment to respondents, after very brief hearing and lack of full investigation of administrative record.

Appeal was filed in the United States Court of Appeals for the District of Columbia Circuit on September 19, 1980. Decision was affirmed by the Court of Appeals July 1, 1981. (Appendix B pp. 2a-4a) Order of the Court of Appeals denied petition of petitioner for rehearing *en banc.* (Appendix A p. 1a) August 31, 1981.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Deprived Petitioner of a Property Interest in Continued Employment Without Procedural Safeguards In Contravention of the Fifth and Fourteenth Amendments

In a case which was remanded to determine possible property interests in employment, *Colm v. Vance,* 567 F.

2d 1125, 1127 n. 1, (D.C. Cir. 1977) several cases involving property interests which were held to be entitled to procedural due process protection under either the fifth or fourteenth amendments were listed: *Goss v. Lopez,* 419 U.S. 565 (1975) (public education), *Perry v. Sindermann,* 408 U.S. 593 (1972) (public employment), and others.

Petitioner points to Public Law 93-407 (1974) which in § 204(a) provides for the issuance of a teacher's certificate, which by School Board regulations is valid for five years. Petitioner was granted such a certificate September 1, 1975 (App. 32). It was issued by the Public Schools of the District of Columbia, Office of State Administration, Board of Examiners, signed by Solomon I. Kendrick, Chief Examiner, and is entitled Five-Year Teaching Certificate and states:

> This is to certify that Eunice C. Madison has fulfilled requirements for a five-year teaching certificate in compliance with Public Law 93-407, Section 204(a) and subject to all provisions of the D.C. Code and the Rules of the Board of Education. No. 02985, 318-01-7433.

Its expiration date was August 31, 1980. Petitioner has completed six additional credits and applied for continuation of the certificate to August 31, 1985.

The certificate clearly created a property interest in her employment. That she was deprived of such property interest by inadequate notice violated her constitutional rights. She was a tenured non-probationary employee separable only for cause. A public employee had a protected property interest in employment which is explained in *Arnett v. Kennedy,* 416 U.S. 134 (1974). The Supreme Court has said that "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State

and all of its creatures – Boards of Education not excepted." *Board of Education v. Barnette,* 319 U.S. 624, 637 (1943)

The Supreme Court of Michigan held in *Rockwell v. Board of Education of the School District of Crestwood,* 227 N.W. 2d 736 (Sup. Ct. Mich. 1975) that a teacher's tenure constituted property. The Supreme Court stated in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950) that due process requires a "hearing appropriate to the nature of the case," though its nature and formality could vary widely. *Boddie v. Connecticut,* 401 U.S. 371, 373 (1970). See also *Arnett v. Kennedy,* 416 U.S. 134, 155 (1974), *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

The court in *Kizas v. Webster.* 492 F. Supp. 1135 (D.D.C. 1980) protected a property interest in a preference which was sufficient to invoke due process protection.

Though not pleaded in the lower court the full constitutional rights of petitioner cannot be ignored, and the Supreme Court has the power to consider such important constitutional issues. Consideration of issues not presented in the Court of Appeals is not beyond the power of the Supreme Court. *Vance v. Terrazas,* 444 U.S. 252 (1980).

2. The Decision Below Conflicts with the Usual Procedures of the Court of Appeals in Reviewing Judgments of the United States District Court

The appropriateness of summary judgment is set forth in Fed. R. Civ. Pro. 56(c) which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has stated that summary judgment is appropriate only where "the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and no genuine issue remains for trial and that the purpose of the rule is not to cut litigants from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 627 (1944); accord, *Hurtado v. U.S.*, 410 U.S. 578, 587-88 n. 8 (1973), quoted in *Bonner v. Califano,* 516 F. Supp. 310 (E.D. Pa. 1981).

In a supporting affidavit (App. 44-45) in the case at bar, it was implied by George Margolies, Legal Counsel to the Superintendent of D.C. Schools, that the District of Columbia Comprehensive Merit Personnel Act (CMPA) was in effect at time of petitioner's termination. It, however, had not been put into effect until October 10, 1980, for DCPS as evidenced by the D.C. Register of that date. The dual personnel system involving Civil Service Classified personnel and Teachers' Salary Act classified personnel had not changed at the time of petitioner's termination.

At a status hearing in June 1980 the Judge in the District Court asked petitioner's counsel if he had any results of discovery. Petitioner's counsel at that time had not conducted any, but the Judge did not order discovery. Therefore, evidently none was accomplished. Evidently the Judge had thought it essential at one point. Failing any discovery, it was essential that full consideration should have been given to the administrative record, especially the matter that the law cited in the separation documents was

not D.C. Code 31-723 (c), but Public Law 93-407 which had no provision covering mandatory retirement. The Superintendent's discretion to waive or not waive the retirement should have been considered, as well as the arbitrary nature of the Superintendent's failure to waive it when there was critical need for petitioner's services.

In an employee discharge case, *Walker v. Washington,* 627 F.2d 541, 544 (D.C. Cir. 1980) the Court stated:

> The decisions of this Court establish that the scope of review in employee discharge cases, such as we have here, is limited. Such cases, although framed as original district court actions for reinstatement and related relief, are decided on the basis of the administrative record and governed by principles applicable to judicial review of administrative action.

Their review is limited to determine if all procedural rights were observed and whether the decision was arbitrary and capricious. *Gueory v. Hampton,* 510 F.2d 1222. (D.C. Cir. 1974) The court stated that its "role is to review the record, with an eye toward procedural or substantive error and arbitrary or capricious agency action". *Polcover v. Secretary of the Treasury,* 477 F.2d at 1226-27 (D.C. Cir. 1973).

Pursuant to Civil Service regulations, *Walker supra* received notice of the proposed dismissal at least 30 days in advance of the proposed action. This is in contrast to the one day's notice which petitioner received. The 30 days' notice for discharge cases is not effective until 30 days' after receipt of notice. When the employees classified according to Civil Service Rules were subject to mandatory retirement they had 60 days' notice after receipt of the letter of dismissal.

Error was shown in granting summary judgment in *National Association of Government Employees v. Campbell,* 593 F.2d 1023, (D.C. Cir. 1978) and the case was reversed and remanded. The court stated at 1027 that "the record must show the movant's right to [summary judgment] 'with such clarity as to leave no room for controversy'" quoting *Semaan v. Mumford,* 335 F.2d 704,705 (D.C. Cir. 1964). The court also quoted from *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 160 (1970): "[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue" the Supreme Court instructs, "summary judgment must be denied *even if no opposing evidentiary matter is presented."*

> Although, of course, it is preferable and certainly advisable for the opposing party to submit affidavits or other counter-active materials, such rebuttal is not necessary "[w]here by the nature of things the moving papers themselves demonstrate that there is inherent in the problem a factual controversy . . ."[4]

National Association of Government Employees, supra, at 1029

In State v. Pierce, 555 P.2d 662 (Ariz. App. 1976) it was held that failure to conduct an adequate investigation into the facts necessary constituted an abuse of discretion in a trial court's ruling.

Adequate investigation of the facts in the case at bar was not made. Respondents have by a bald statement averred that there are no positions in DCPS in the competitive service. Since there were 49 GS classified teacher positions in the budget for FY 1981 Operating Budget for DCPS, and Civil Service classified persons with competitive status

[4]Quoting from *Inglett & Co., Inc. v. Everglades Fertilizer Co.,* 255 F.2d 342, 348 (5th Cir. 1958).

did not lose such status, and the position they occupied was placed in the competitive service while the person with such status occupied the position[5] the bald statement of respondents that there were no positions in the competitive service in August 1979 when petitioner was mandatorily retired, does not fit the preponderance of evidence standard. The possibility is that there may have been positions in the competitive service in DCPS for the foregoing reasons, as well as the requirement that Federal Merit System Principles were required to be applied for all Federally funded programs,[6] and age discrimination was forbidden in such programs.

Respondents include with their brief in the Court of Appeals, Federal Personnel Manual System FPM Letter 212-1 dated July 17, 1979, which recommends that employees' previous records be searched to determine if they have competitive status. If petitioner's previous records were searched they would determine that petitioner had competitive status for lifetime availability under Civil Service Rules, acquired in April 1956. The remedial aspect of ADEA is to be broadly construed, rather than narrowly, as judged in the decision below and affirmed by the Court of Appeals. The Judgment in the lower court should be overturned.

3. The Decision Below ignores the fact that DCPS is a Political Subdivision of a State and Municipality Subject to the ADEA by Federal law and Mayoral Order Protecting Petitioner From Any Employment Discrimination on the Basis of Age

DCPS is required to abide by ADEA. The judgment of the Court of Appeals (Appendix B, pp. 2a-4a) is in error when it states: "Nowhere in the D.C. Code, in this or any

[5] § 204(g) Pub. L. 93-198.

[6] § 3207(d) D.C. Law 2-139.

other respect, do we find any indication that the ADEA was intended to undercut the historic independence of the District of Columbia Public School system." p. 2 of Judgment, July 1, 1981 (Appendix B p. 4a.).

Public Law 93-259, the 1974 Amendments to the Fair Labor Standards Act (FLSA), incorporating also amendments to the ADEA, added states or political subdivisions of states, and any agency or instrumentality of a state as employers covered by the Act. Sec. 28 (a)(2).

Thus DCPS being a political subdivision of a state is covered by the ADEA, and its independence in age discrimination in employment matters *is* undercut by ADEA, contrary to the statement in the judgment of the Court of Appeals. (Appendix B, p. 4a).

Section 15(a) of Public Law 93-259 provides:

"Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

The ADEA provides that any involuntary retirement must be supported by a "bona fide occupational qualification reasonably necessary to the operation of a business, or by a differentiation on reasonable factors other than age." Otherwise the action is a "subterfuge to evade the purposes of this Act."

It is curious to note that the wording of the Civil Rights Act (CRA) 42 U.S.C. § 2000e-16 and the ADEA 29 U.S.C. § 633a is in *haec verba* the same providing that "those units of the Government of the District of Columbia having positions in the competitive service," shall be made free of any discrimination based on race, color, religion, sex, or national origin under CRA and free from

any discrimination based on age under ADEA. Yet DCPS follows the CRA as announced on their Job Opportunities List which states:

> The Public Schools of the District of Columbia fully comply with the requirements of Title IX of the 1972 Education Amendments, Title VII of the Civil Rights Act of 1964, Title 34 of the D.C. Rules and Regulations (Human Rights Law) and Section 504 of the Rehabilitation Act of 1973. Mr. Emanuel Carr. [Equal Employment Officer]

No mention is made of the ADEA which they are required to enforce also. No notices were ever posted in regard to it as required by ADEA, 29 U.S.C. 627.

In an ADEA discharge case the Court explained:

> The ADEA makes it unlawful "to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." (29 U.S.C. § 623(a) This proscription is enforced through express incorporation of the remedial rights and procedures of the Fair Labor Standards Act (FLSA) rather than through independent ADEA remedies. Section 7(b) of the ADEA, 29 U.S.C. § 626(b) provides that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 . . . and 17 of the Fair Labor Standards Act of 1938, as amended . . ." Pursuant to those statutes, an employer who violates the ADEA is liable for back wages and benefits, "as well as" an additional amount as liquidated damages". (Footnotes omitted) *Kelly v. American Standard, Inc.*, 640 F.2d 974, 977-78 (9th Cir. 1981)

In *EEOC v. Florissant Valley Fire Protection District,* 21 Emp. Prac. Dec. (CCH) ¶ 30,520 (E.D. Mo. 1979) the court saw no reason to "conclude that application of the ADEA to states and their political subdivisions, particularly in light of the BFOQ defense embodied in 29 U.S.C. § 623(f)(1), will directly displace their freedom to structure integral operations in areas of traditional governmental functions." *Cf. Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), *Arritt v. Grisell,* 567 F.2d 1267 (4th Cir. 1977), *Remmick v. Barnes County,* 435 F. Supp. 914 (D.N.D. 1977). The court said:

> To the extent that a state *could not show that age was a BFOQ,* it is difficult to see how the state could legitimatize its interest in maintaining discrimination within their traditional structure of employer-employee relationships (Emphasis supplied)

EEOC, supra at 13,805.

The older employees were not less cost-efficient. Defendant's motion to dismiss was denied.

DCPS is subject to the mayoral order DPM 21A-12 dated July 6, 1978, (App. 24-26) because it is a part of the D.C. Government as argued in a recent employee discharge case in the District of Columbia Court of Appeals, *District of Columbia v. White,* CA 043-78, D.C. App. 80-460, August 1981. The superintendent of schools had not made written recommendation for the discharge of *White, supra* as required by D.C. Code § 31-102. The judgment of the D.C. District Court of Appeals held that personnel functions could be delegated in accordance with 5 U.S.C. 302.

In *Usery v. Board of Education of Salt Lake City,* 421 F. Supp. 718 (D. Utah C.D. 1976) the Court stated that

> Congress has a national interest in preventing arbitrary discrimination on the basis of age and this includes protecting the significant number of individuals employed by states or instrumentalities and agencies thereof . . . Such a policy choice *to discriminate on the basis of age in selecting individuals for employment within a state education system* is outweighed by the significant national interest in insuring nondiscriminatory employment practices in areas affecting interstate commerce, even assuming that public education represents an integral state government operation. (Emphasis supplied).

Id at 720.

The Court stated that 29 U.S.C. § 623 (a) of ADEA provided constitutional limitations upon the exercise of state authority and was enacted to enforce the "substantial guarantees of Section 1 of the 14th Amendment." *Id.* at 721. Defendant's motion for summary judgment was denied.

The decision in the case at bar conflicts with another educational case involving mandatory retirement of a teacher, *Gault v. Garrison,* 569 F.2d 993 (7th Cir. 1977) *cert. denied,* 440 U.S. 945 (1979). The case involved the mandatory retirement of a school teacher at age 65, with opportunity to continue in employment with yearly renewals thereafter, but without procedural safeguards. In that case, as in the case at bar, no evidence was adduced proving a teacher's unfitness to teach after age 65. The court said:

> Even if we could assume that the purpose of these provisions is to remove unfit teachers, the requirement must fall. Again, unlike the situa-

> tion in *Murgia,*[7] there has been no evidence presented to indicate any relationship between the age of 65 and a school teacher's fitness to teach. The physical demands of teaching do not even begin to approach those found by the Supreme Court, upon credible evidence, to be critical to the performance of uniformed state police duties. No evidentiary proof is necessary to note that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental faculties diminish at age 65. On the contrary, as suggested by plaintiff's offer of Proof, much in the way of knowledge and experience so helpful to the educational profession, is often gained through years of practice.

Id at 996.

In a concurring opinion Senior Circuit Judge Barnes stated that the proper age for retirement of teachers was not the concern of the court. They were not concerned with imperfect classifications, but it was impossible to apply such principles to the case, and to "judge the issues and apply the law" because no evidence had been presented.

In the case at bar no evidence at all has been presented that a psychologist's abilities decline at age 70. In fact petitioner's abilities had increased since she reached that age. It was an abuse of discretion to grant summary judgment on the basis of the arbitrary determination of age alone for the mandatory retirement of petitioner, and to ignore very important elements of the administrative record as well.

Public Law 93-407 establishes that petitioner's salary was both federally and locally determined, as the very ex-

[7] *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).

tensive salary tables for TSA employees in that Act demonstrate. It was arbitrary to ignore the dual personnel system existing in DCPS prior to the establishment of the D.C. CMPA, which was not effected in DCPS until October 1980, though D.C. Law 2-139 had specified it should be implemented by January 1980.[8] In any event it was not in effect in August 1979 at time of Petitioner's mandatory retirement, though Respondents in affidavit imply that it was. Another Act, cited by them, the D.C. Retirement Reform Act, Public Law 96-122, was not in effect at time of petitioner's forced retirement. It did not become effective until November 17, 1979.

An employee in a denial of promotion case in the District of Columbia was covered by 29 U.S.C. § 633a and protected from "any discrimination based on age" as provided in the ADEA, though neither party in the case cited it, but admitted in oral argument that it applied to the case. *Kennedy v. Whitehurst,* 509 F. Supp. 226 (D.D.C. 1981) 228 n. 7.

4. DCPS Promotes Unequal Protection of the Laws in Contravention of the Fourteenth Amendment When it Subjects Some of its Employees such as Petitioner to Mandatory Retirement, and allows the Full Protection of the ADEA To Its Other Employees Retired by Their Own Regulations under the Civil Service Retirement Act, From Which the ADEA has abolished Mandatory Retirement

In *Usery, supra,* it was held that a public education system must operate within constitutional bounds.

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[8]Public Law 93-198. Sec. 422 (3) provided that "The District government merit system shall be established by act of the council. The system may provide for continued participation in all or part of the Federal Civil Service System . . .

5. Discretion Not Exercised at its Legal and Required Time to Mandatorily Retire Petitioner, i.e. When she became 70 in 1977 Constituted a Waiver of Such Mandatory Retirement, and non-effecting of the retirement in June 1979 pursuant to notice of May 30, 1979, Also Constituted a Waiver of Such Retirement.

Petitioner in being outstandingly capable and competent in performing her duties proved that age was not a bona fide occupational qualification for a psychologist. In fact her abilities had increased to the point where she was deemed to be very essential to the service, for which reason her supervisor had requested that the requirement for mandatory retirement be waived.

Though no documentation signed by the Superintendent was received in August 1979 automatic waiver had occurred in 1977 and June 1979.

6. Age Discrimination by DCPS in Employment Actions is in Contravention of the Age Discrimination Act of 1975 (ADA) which specifies no age limits and Which Proscribes Age Discrimination in Employment Actions by any Agency participating in Federal Fund Assistance, and DCPS is an Agency considerably assisted by Federal Funds under several Acts of Congress.

> D.C. Law 2-139 § 139 § 3207(d) provides that wherever Federal Merit system Standards are applicable to a District program financed in whole or in part by the federal funds, the Mayor shall establish rules and regulations to the extent necessary to apply such standards to personnel administration in such grant-in-aid programs and the positions and employees therein.

At last inquiry such rules and regulations had not been issued, but Public Law 95-454 provides the guidelines for Merit System Principles 5 U.S.C. §§ 2301, 2302.5 U.S.C. § 2302 (b)(1)(B) forbids discrimination "on the basis of

age, as prohibited under sections 12 and 15 of the ADEA 29 U.S.C. 631, 633a. No doubt when the Mayor issues his regulations they must abide by such Federal Merit System principles.

DCPS received $43,613,400 in Fiscal Year 1979 and $43,353,400 in Fiscal year 1980 in federal fund assistance, as shown in their FY 1981 Operating Budget, and thus is obliged to eliminate discrimination on the basis of age in its employment practices. If an agency does not wish to follow federal guidelines, it may discriminate, but must forego the federal funds assistance.

7. The ADEA Is a Remedial Act Setting forth Congress' Intent and Purpose "To Promote Employment of Older Persons Based on Their Ability Rather Than Age, and To Prohibit Arbitrary Age Discrimination in Employment", and the Action of DCPS in Mandatorily Retiring Petitioner On the Arbitrary Basis of Age Alone, Contravened such Remedial Purpose, and Should be Overturned

In *Coates v. National Cash Register Co.*, 433 F. Supp. 655 (W.D. Va. 1977) it was stated that right to a jury trial was clarified in the Fourth Circuit in *Pons v. Lorillard,* 549 F.2d 950 (4th Cir. 1977) 414 U.S. 575 (1978), where the Court of Appeals concluded that legal relief under ADEA were suits "at common law" under the Seventh Amendment, and included a right to a jury trial. In *Coates, supra,* an advisory jury was impaneled under Rule 39(c) Fed. R. Civ. Proc., and the court made findings of fact and conclusions of law under Rule 52(a).

To make employment decisions because of an employee's age is mentioned several times in ADEA as being prohibitory, and the courts must decide how much weight to give to an employee's age. *Bishop v. Jeleff Associates,* 398 F. Supp. 579 (D.D.C 1974) first defined this standard. [T]he statutes is not violated in the case of termination or other employer decisions which are premised

upon a rational business decision made in good faith and not actuated by age bias."
Id at 593.

In *Coates, supra*, plaintiffs were awarded back pay and damages for emotional distress, and reinstatement to the office where formerly employed, and reasonable attorney's fees.

The decision of the lower court conflicts with a decision where discretion was allowed the employer when an employee had reached retirement age. In *Langman v. Western Elec. Co.*, 488 F. Supp. 680 (S.D.N.Y. 1980), the Court refused to grant summary judgment to defendants, holding that the Western Electric plan was not covered by the 29 § 623 (f)(2) exception in ADEA which states:

> It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of the Act . . .

This case was contrasted with *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977) wherein no option was permitted whether or not to retire employees who had reached retirement age, but the retirement was mandated. It was a bona fide plan as long as it paid substantial benefits.

In *Langman supra*, under Western Electric's plan the employer had the option to continue the employee in employment. The Court held that since the employer was under no compulsion to retire the employee who had reached retirement age,

> "he need not choose between obeying the law (the ADEA) that states *that he may not discriminate on the basis of age*, and observing it (i.e. obey-

> ing) the terms of the benefit plan. He may do both by exercising his discretion in the employee's favor. Such an employer is therefore not covered by the exception, and may not exercise his discretion to involuntarily retire an employee *solely on the basis of age.* (Emphasis supplied.)

Id at 685.

Such a decision coincides with the humane liberal purpose of ADEA and Congress' intent in passing it. Such a decision contrasts starkly with the arbitrary and capricious decision in the case at bar where the Superintendent in the face of critical need for petitioner's services did not waive the retirement requirement, thus subjecting some handicapped children to delay in being evaluated for appropriate educational placement. The Court in *Langman, supra,* did not even require a determination of BFOQ or overriding state interest.

In the case at bar the remedial aspect of ADEA should be broadly construed, rather than narrowly, as judged in the decision below and confirmed by the Court of Appeals.

8. The Exercise of Discretion in An Employment Action Cannot be Arbitrary or Capricious, but must be soundly Based and in Conformance with ADEA on a bona fide occupational qualification or Overriding Legitimate State Interest Therefor, or if Discretion is Allowed no departure From the Requirements of ADEA are valid.

Arbitrary capricious decision should not be the basis for an employment decision under ADEA or ADA. Discretion should be soundly based on a bona fide occupational qualification, which would involve a trait that all persons over a certain age would have. It should have as its basis a legitimate overriding state interest that is not a subterfuge to evade the purposes of the Act. The case of a com-

pulsorily retired 70-year old employee of a county department of public welfare was remanded to give the employee an opportunity to prove his allegations of selective and discriminatory administration of the compulsory retirement statute, *Parker v. the State of Indiana,* 400 N.E.2d 796 (3rd Dist. Ct. App. Ind. 1980)

9. DCPS Cannot Enforce a Law more restrictive than the Congress Act, the ADEA, in contravention of the United States Constitution and the legislative Authority of Congress over all D.C. laws whatsoever. The Mandatory Retirement of Petitioner in the Face of Such Legislative Control is Invalid and must be Overturned

Congress has the power to veto any Act of the D.C. Council. In October 1981 Congress used such power by vetoing the Sexual Assault Reform Act 4-122 which had been passed by the D.C. Council July 14, 1981. Thus preemption would set aside the more restrictive law Public Law 90-231 and D.C. Code 31-723(c), which are more restrictive than the ADEA. Under ADA such a principle would be applicable also, since programs assisted by federal funds should not practice age discrimination, unless they are willing to forego the federal fund assistance.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 1982

Appendix

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2145 September Term, 1980

Eunice C. Madison,
Appellant

Civil Action
No. 80-01061

v.

Marion S. Barry, Jr., Mayor
The District of Columbia, et al.

ARGUED 6-15-81

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellant's pro se suggestion for rehearing *en banc*, filed August 13, 1981, has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY /s/
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

Filed AUG 31, 1981

GEORGE A. FISHER
CLERK

APPENDIX B

Not to be published – See Local Rule 8 (f)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2145 September Term, 1980

Eunice C. Madison, Appellant, Civil Action No. 80-01061

v.

Marion S. Barry, Jr., Mayor
The District of Columbia et al.

FILED JUL 1 1981
GEORGE A. FISHER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGOWAN, WILKEY and WALD, Circuit Judges

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been accorded full consideration by the Court; they occasion no need for an opinion.

Appellant was employed as a psychologist in the District of Columbia Public Schools ("DCPS") when, on August 31, 1979, she was mandatorily retired pursuant to D.C. Code § 31-723(c), which allows for mandatory retirement of teachers who reach the age of 70. Appellant sued under the Age Discrimination in Employment Act ("ADEA") for damages and restoration to her former position. The District Court granted summary judgment in favor of DCPS, recognizing that the ADEA is limited in applica-

tion to "personnel actions . . . in those units in the government of the District of Columbia *having positions in the competitive service.*" 29 U.S.C. § 633(a) (Supp. III 1979) (emphasis added), and appellant did not hold a position in the "competitive service."

On appeal neither party challenges the District Court's factual finding that appellant herself did not hold a position in the "competitive service;" rather, they differ as to whether section 633 imposes such a requirement as to each individual complainant. Appellant argues that section 633 may better be interpreted to provide that if a unit of the District of Columbia government has *any* positions within the "competitive service," all of its employees are covered by the ADEA. The District contends that even if this interpretation were sound, appellant still could not prevail because DCPS has *no* positions which fall within the "competitive service."

We find it necessary to address only this last contention for the reason that we do not think that any DCPS positions meet the standard for inclusion in the "competitive service" set forth in the ADEA: "positions in the government of the District of Columbia which are *specifically included in the competitive service by statute.*" 5 U.S.C. § 2102(a)(3) (Supp. III 1979) (emphasis added). Unlike several other District of Columbia agencies which the District admits to be within the ADEA definition of "competitive service," DCPS does not operate pursuant to any Civil Service Commission rules, nor is it required to comply with the federal Civil Service requirements for personnel action, affirmative action, and the like. *Cf.* D.C. Code § 3-105 [Board of Public Welfare subject to federal Civil Service requirements]. The only statute which even arguably creates a "competitive service" within DCPS does no more than authorize a locally developed and supervised

system of testing; *see* D.C. Code § 31-212 [the appointment of attendance officers, inspectors, and several other public school officials "shall be made from a list of applicants obtained from open competitive examinations conducted by the respective boards of examiners of the Board of Education."]. Nowhere in the D.C. Code, in this or any other respect, do we find any indication that the ADEA was intended to undercut the historic independence of the District of Columbia Public School system.

On consideration of the foregoing, it is

ORDERED and ADJUDGED by this court that the District Court's grant of summary judgment is hereby affirmed.

Per Curiam
For the Court

/s/
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUNICE C. MADISON, Plaintiff,	)	FILED
	)	AUG 26 1980
	)	JAMES E. DAVEY, Clerk
v.	)	
	)	Civil Action
MARION S. BARRY, JR., Mayor, District of Columbia, et al., Defendants.	)	No. 80-1061

MEMORANDUM OPINION

This case requires the court to determine whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, as amended by the Age Discrimination in Employment Act Amendments of 1978, applies to a person employed as a psychologist by the Public Schools of the District of Columbia.

In June, 1979, the plaintiff, a psychologist, received notice from her employer, the Public Schools of the District of Columbia, that she would be discharged on account of her age in accordance with D.C. Code § 31-723(c). Section 723(c) provides,

> Any teacher who becomes seventy years of age shall be separated from the service unless upon the written recommendation of the Superintendent of Schools two-thirds of the members of the Board of Education vote to retain such teacher in the public schools for the good of the service.

The plaintiff was born on August 2, 1907; hence, at the time of the notice she was seventy one years old.

The plaintiff sues under section 633a of the ADEA, which provides:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in those units in the government of the District of Columbia having positions in the competitive service . . . shall be made free from any discrimination based on age.

She contends that section 633 applies to her and overrides the terms of section 723(c) of the D.C. Code. The defendants reply that section 633a does not apply to employees such as the plaintiff.

Both sides move for summary judgment. This court is persuaded that because the plaintiff is not "in the competitive service," as required for application of the ADEA to District of Columbia personnel, the defendants must prevail.

Discussion

The defendants' position is that the term "competitive service," as used in section 633a, does not include employees like the plaintiff. They rely on two statutory provisions. 5 U.S.C. § 2102 and § 5102. Section 2102(a)(3) provides that the "competitive service" consists of, *inter alia*, "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." On the basis of this provision the defendants argue that because there is no statute specifically including employees like the plaintiff in the

competitive service, she must be considered to be without the competitive service.

On the basis of section 5102(c) the defendants argue that the plaintiff's salary was locally determined rather than federally, so she clearly was not in the federal competitive service. Section 5102(c) provides that Chapter 51 of Title 5, United States Code, does not apply to certain persons. Labelled "Classification," Chapter 51 undertakes to classify positions of federal employment in order to ensure fairness and reasonableness of remuneration. By virtue of section 5102(c)(4), Chapter 51 does not apply to "teachers, school officials, and employees of the Board of Education of the District of Columbia whose pay is fixed under chapter 15 of title 31, District of Columbia Code . . . ." Chapter 15, of Title 31, D.C. Code, deals with "salaries of teachers, schools officers and other employees," according to its heading. The defendants argue, and this appears clear from the defendants' Exhibit A, that the plaintiff's pay was fixed under Chapter 15 of Title 31, D.C. Code, as required for application of section 5102(c)(4), and that she was a "school official" within the meaning of section 5102(c)(4). Therefore, because her pay scale was not set under the federal scheme in Title 5 but instead under the local scheme in Chapter 15, D.C. Code, Title 31, it follows that the plaintiff was not within the federal competitive service.

In support of its argument that the D.C. Public Schools as a whole are not within the federal competitive service, the defendants emphasize the extent to which the Public Schools have historically been managed independently of the federal competitive service. They cite a 1963 opinion of the D.C. Corporation Counsel expressly stating with regard to the D.C. Board of Education that "Federal employment is separate and distinct from District employ-

ment." They also submit an affidavit of George Margolies, Legal Counsel to the Superintendent of Schools, D.C. Public Schools, who states that "the D.C. Public Schools . . . [is] not within the 'competitive service' . . ." Mr. Margolies points out that the sick leave, retirement system, pay computation, and other aspects of employment with the Public Schools are completely independent of and substantially distinct from the equivalent aspects of the federal competitive service.

The plaintiff admits that her employment was regulated by the D.C. Teachers' Salary Act (TSA), in D.C. Code Title 31, and that the TSA provides for mandatory retirement at age seventy. She argues, however, that Congress has the power to alter or override any law in the District of Columbia and that in the ADEA it exercised that power. Recognizing that repeals by implication are disfavored, she argues on the basis of *Radzanower v. Touche Ross & Co.*, 96 S.Ct. 1989 (1976), that because of the "positive repugnancy" between the TSA and the ADEA, "they cannot mutually coexist," *id.* at 1993. This repeal-by-implication argument constitutes the heart of the present dispute.[1]

As the defendants argue, "when two statutes are capable of coexistence, it is the duty of the court to regard each as effective." *Radzanower v. Touche Ross & Co.*, 96 S.Ct. at 1993. And here the court is persuaded that the TSA and ADEA are manifestly capable of coexistence. Repeals by implication are indeed disfavored, and a court should not assume the existence of such unless the legislative intent to

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[1]The plaintiff purports to rely "not on repeal by implication in the traditional sense, but rather the creation in 1978 of the right to be relieved of the effect of the earlier law." Plaintiff's Reply 3. The significance of this distinction, if any, is unclear.

repeal is crystal clear. In the Senate Report, S. Rep. 493, 95th Cong., 1st Sess. (1977), and other legislative materials that the defendants cite,[2] there appears no intent, clear or otherwise, to override the TSA.

In her Reply the plaintiff makes the unpersuasive argument that although her own position is not in the competitive service, what is critical for purposes of the applicability of the ADEA is that the D.C. Public Schools as a whole have some employees in the federal competitive service. She bases this creative contention on the undeniably inartful language of section 633a, which says its prohibitions apply to "those *units* . . . *having positions* in the competitive service." (Emphasis supplied.) This court is persuaded that even if the Public Schools do have some positions in the federal competitive service, this fact does not bring the plaintiff within the scope of section 633a. The plaintiff's argument strains the scope of that section beyond the limits set by its language and manifest intent.

For the above reasons the defendants' motion for summary judgment must be granted. An appropriate Judgment accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

Dated: 8-26-80

[2]The plaintiff makes no meaningful attempt to rebut these legislative materials.